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THE SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM

DENNIS G. REZANSON, TRUSTEE FOR
MEDOMAK CANNING COMPANY, INC.,
Petitioner

v.

METROPOLITAN INSURANCE AND ANNUITY COMPANY,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE ERIE DOCTRINE PREVENTS A FEDERAL COURT OF APPEALS, WHICH THROUGH DE NOVO REVIEW FINDS UNREASONABLE THE FEDERAL DISTRICT COURT'S RESOLUTION OF AN UNSETTLED QUESTION OF STATE COMMON LAW, FROM FASHIONING ITS OWN RULE RATHER THAN ATTEMPTING TO PREDICT, BASED UPON THE AVAILABLE AUTHORITIES, HOW THE STATE'S HIGHEST COURT WOULD DECIDE THE ISSUE?

II. WHETHER A FEDERAL COURT OF APPEALS, WHICH FINDS UNREASONABLE A FEDERAL DISTRICT COURT'S RESOLUTION OF UNSETTLED STATE COMMON LAW, SHOULD CERTIFY THE DETERMINATIVE STATE LAW ISSUE TO THE STATE'S HIGHEST COURT PURSUANT TO AN AVAILABLE CERTIFICATION PROCEDURE, WHERE THE RULE PROPOSED BY THE COURT OF APPEALS CONSTITUTES THE EQUIVALENT OF A LEGISLATIVE ENACTMENT AMENDING ALL LIFE INSURANCE CONTRACTS IN MAINE, AND IS UNSUPPORTED BY OR CONTRARY TO STATE LAW GENERAL PRECEDENT?

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Bezanson v. Metropolitan Ins. and Annuity Co., Nos. 01-1306, 91-1357 (1st Cir. Jan. 7, 1992) (Order denying petition for rehearing).

Bezanson v. Metropolitan Ins. and Annuity Co., Nos. 91-1306, 91-1357 (1st Cir. Dec. 13, 1991).

Bezanson v. Metropolitan Ins. and Annuity Co., Civil No. 90-0018-B (D. Me. Mar. 1, 1991).

JURISDICTIONAL STATEMENT

(i) Date of entry of the judgment to be reviewed: Dec. 13, 1991.

(ii) Date of order respecting rehearing: Jan. 7, 1992.

(iii) Statutory provision conferring jurisdiction on this Court to review the judgment below: 28 U.S.C. §1254(1)

STATUTES INVOLVED

1. 62 Stat. 944, 28 U.S.C. §1652:

   State laws as rules of decision

   The laws of the several states, except where the Constitution or treaties of the United States or acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944.

2. Me. Rev. Stat. Ann. tit. 4, §57 (1989) (relevant provision is found in the last paragraph):

   Jurisdiction; disposition of cases; technical errors in pleading and procedure

   The following cases only come before the court as a court of law: Cases on appeal from the Superior Court or a single Justice of the Supreme Judicial Court or from the probate courts; questions of law arising on reports of cases, including interlocutory orders or rulings of such importance as to require, in the opinion of the justice, review by the law court before any further proceedings in the action; agreed statement of facts; cases presenting a question of law; all questions arising in cases in which equitable relief is sought; motions to dissolve injunctions issued after notice and hearing or continued after a hearing; questions arising on habeas corpus, mandamus and certiorari and questions of state law certified by the federal courts. They shall be marked "law" on the docket of the county where they are pending, and there continued until their determination is certified by the clerk of the law court to the clerk of courts of the county and the court shall immediately after the decision of the question submitted to it

make such order, direction, judgment or decree as is fit and proper for the disposal of the case, and cause a rescript in all civil actions, briefly stating the points therein decided, to be filed therein, which rescript shall be certified by the clerk of the law court to the clerk of courts of the county where the action is pending and to the Reporter of Decisions. If no further opinion is written out, the reporter shall publish in the next volume of reports thereafter issued the case, together with such rescript if the reporter deems the same of sufficient importance for publication.

When the issues of law presented in any case before the law court can be clearly understood, they shall be decided, and no case shall be dismissed by the law court for technical errors in pleading alone or for want of proper procedure if the record of the case presents the merits of the controversy between the parties. Whenever, in the opinion of the law court, the ends of justice require, it may remand any case to the court below or to any justice thereof for the correction of any errors in pleading or procedure. In remanding said case, the law court may set the time within which said correction shall be made and said case reentered in the law court.

When it shall appear to the Supreme Court of the United States, or to any court of appeals or district court of the United States, that there are involved in any proceeding before it one or more questions of law of this State, which may be determinative of the cause, and there are no clear controlling precedents in the decisions of the Supreme Judicial Court, such federal court may certify any such questions of law of this State to the Supreme Judicial Court for instructions concerning such questions of state law, which certificate the Supreme Judicial Court sitting as a law court may, by written opinion, answer.

STATEMENT OF THE CASE

This matter originated as a diversity action by Petitioner, Dennis G. Bezanson, Trustee in Bankruptcy (Chapter 7) of Medomak Canning Company, Inc. (Trustee), on a policy of insurance issued by Respondent, Metropolitan Insurance and Annuity Company (Metropolitan) on the life of Medomak's late president, Bernard J. Lewis. Medomak is the named owner and beneficiary of the policy. When Lewis died on May 27, 1989, Metropolitan was subsequently informed of the death and asked to pay the policy proceeds of $500,000 to the Trustee for Medomak. Metropolitan refused to tender the policy proceeds to the Trustee, asserting that the policy had lapsed on January 5, 1989, prior to Lewis' death. The Trustee thereafter filed a declaratory judgment action for payment of the proceeds.

The facts relevant to this Petition for Certiorari are as follows: On January 5, 1984, Metropolitan issued a $500,000 flexible premium life insurance policy to Medomak, a Maine corporation. The policy owner and beneficiary was Medomak and the person insured under the policy was Bernard J. Lewis, president of Medomak at the time the policy was issued.[1]

Advance premiums on flexible premium life policies are credited to an accumulation fund, then deductions are made from the fund to cover the cost of insurance as it accrues. This particular policy required a $4,350.00 semiannual advance premium to set up the accumulation fund, then monthly deductions were charged against the premium payment on the fifth day of each month. If the accumulation fund was ever found to be less than the monthly premium due, the policy promised a "grace period" of 61 days during which the shortfall and premium could be paid. If by the end of the grace period the premium remained unpaid, only then would the policy lapse. To ensure that the policyowner would get the benefit of the grace period, the policy terms obligated Metro-

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[1]At the time the policy was issued, the policy was subject to a collateral assignment not relevant to this discussion.

politan to send a notice to the policyowner and any collateral assignee on record with Metropolitan.

On April 7, 1986, an involuntary Chapter 7 Bankruptcy Petition was filed against Medomak in the United States Bankruptcy Court for the District of Maine. Petitioner was appointed Bankruptcy Trustee for Medomak on April 23, 1986 and continues in that capacity. Between September 1987 and the time of Lewis' death, correspondence between the Trustee and Metropolitan, in addition to internal documents of Metropolitan, indicate that Metropolitan was aware that Petitioner was Medomak's Trustee in bankruptcy and was aware of Petitioner's South Portland business address. At the time of the filing, the policy had a prepaid fund sufficient to carry the policy over two years.

In mid-January of 1988, the Trustee obtained a policyholder annual statement. It stated that if no premium payments were made, the policy would end on either July or November of 1988, depending upon interest and insurance rates. Following this notification, from January through June of 1988 the Trustee attempted to cash surrender the policy on Lewis. Metropolitan, however, despite Petitioner's status as Trustee for Medomak, refused to cash surrender the policy to the Trustee until it had received written consent from both Medomak and the collateral assignee. During this time, Metropolitan corresponded with the Trustee at the Trustee's office address in South Portland. On July 5, 1988, however, Metropolitan sent a premium payment notice to Medomak Canning Company at Box 4566, Portland, Maine 04112 (one of the locations where the bankrupt corporation formerly received mail) informing Medomak that a premium payment was due.

The Trustee understood that Metropolitan was drawing down the prepaid policy accumulation fund each month, and that at some point the policy would lapse if no action was taken. The Trustee was not aware, however, of any specific date on which the policy would lapse. Rather, the Trustee believed that Metropolitan would send him a prelapse notice. However, on November 7, 1988, Metropolitan sent a notice addressed only to Bernard J. Lewis at Box 4566, Portland, Maine 04112 stating that there was a mini-

mum payment due to avoid lapse on January 5, 1989. Two months later, on January 5, 1989, Metropolitan sent a final termination notice to Bernard J. Lewis at Box 4566, Portland, Maine 04112. This notice stated that the policy terminated as of January 5, 1989. No notice was sent to the Trustee himself, and the Trustee was not aware of the above notices sent to Lewis until after Lewis' death. However, the Trustee testified that he was aware Mr. Lewis had cancer, that the Trustee had funds in the bankrupt estate to continue the policy and that he was awaiting the lapse notice to review Mr. Lewis' condition and decide whether to continue the policy.

Lewis died of cancer on May 27, 1989, less than five months after Metropolitan maintained that the policy lapsed. On November 14, 1989, the Trustee's attorney advised Metropolitan of Lewis' death and requested a check for the policy proceeds. Metropolitan declined to pay on the ground that the coverage had lapsed. Petitioner filed a declaratory judgment action on January 23, 1990 in the United States District Court for the District of Maine. Diversity jurisdiction exists under 28 U.S.C. § 1332 because the Trustee is a Maine resident, Metropolitan is a New York corporation, and the amount in controversy exceeds $50,000.

The parties agreed that the relevant issues in the case concerned the standing of the Trustee to sue on the policy, and whether notice to the Trustee was properly given or required under the policy. As a result, the parties stipulated a record directed specifically to resolution of those issues. Following trial on the stipulated record, the district court entered judgment for Petitioner in the amount of $500,000.00 along with interest from November 14, 1989. Bezanson v. Metropolitan Ins. and Annuity Co., Civil No. 90-0018-B (D. Me. Mar. 1, 1991). In reaching this result, the district court found the following. First, since Maine does not have a lapse statute covering life insurance, the terms of the policy govern. Bezanson, Dist. Ct. slip op. at 6. Second, although the policy does not explicitly condition lapse upon the giving of notice, under Maine law ambiguous insurance provisions should be interpreted strongly against the insurer and, therefore, notice is a precondition to lapse of the policy. Id. at 8. Third, the court found that under Maine law,

if a policy requires that notice be given prior to cancellation, a failure to give such notice keeps the policy in full force. Id. Fourth, as a matter of bankruptcy law, the Trustee was entitled to prelapse notice under the policy, but that Metropolitan did not provide the Trustee with proper notice. Id. at 11. Thus, the district court held that the policy was still in effect at the time of Lewis' death and that the Petitioner as Trustee for Medomak was entitled to the policy proceeds. See id. at 12.

Metropolitan appealed the judgment of the district court, and the Trustee cross-appealed. The United States Court of Appeals for the First Circuit reversed (Selya, C.J. dissenting), and entered judgment for Metropolitan. Bezanson v. Metropolitan Ins. and Annuity Co., Nos. 91-1306, 91-1357 (1st Cir. Dec. 13, 1991). The Court of Appeals appeared to base its judgment on two holdings. First, the Court apparently held that the Trustee's behavior as regards the life insurance policy, which the Court characterized as either incompetence or a desire to play it both ways, estopped the Trustee from recovering on the policy. Bezanson, Ct. of Ap. slip op. at 16. This issue was raised on appeal for the first time by the Respondent, and over the stated objection of the Petitioner in his main brief (and on rehearing), the court of appeals made new findings of fact from the stipulated record, in effect granting a factual trial for the Respondent on appeal. Second, and as will be shown more importantly, the court found unreasonable the conclusion of the district court that under state law, failure to send notice to the Trustee kept the insurance policy in full force until the time of the insured's death. Id. at 11. The court interpreted the district court's holding to mean that failure to send a required notice of lapse would extend the coverage of any policy indefinitely. Id. The court noted that under Maine law, when no time for performance is specified in a contract, a reasonable time is implied. Id. at 12. The court found that the district court's result amounted to a harsh and unreasonable rule, although it made no finding as to whether the district court's rule was consistent with state law. Id. at 11. Instead, the court held that "we consider three times the original grace period should give an owner with a bona fide intent to continue his policy sufficient

time." Id. at 12. The court cited no state law in support of its proposition, nor claimed that its rule was consistent with how Maine's highest court would resolve the issue. See id. at 11-12. Application of the court's rule meant that the policy finally terminated on May 5, 1989, three weeks prior to the death of the insured on May 27, 1989. Id. at 12.

The dissenting judge conceded that the case was made "pleasureless" by the irrelevant behavior of the Trustee, but that the majority's result-oriented opinion in this diversity case "wrenched into unfamiliar contours" the common law of Maine. Id. at 17. In the dissenting judge's view, the federal district court had written an extensive opinion which presaged in most respects what was now written in dissent. Id. What the dissenting judge, found "most disturbing," however, was that the majority fashioned: "a new rule, without a single citation to precedent in point, that an insurer's failure to send a contractually required lapse notice will be excused unless the unnotified policyholder takes action, within a reasonable time, to restore that which he may not yet realize he has lost." Id. at 20-21. On the facts before him, the dissenting judge did not see how an appellate court could, as a matter of law, find that "some imagined limit of temporal reasonableness was exceeded." Id. at 21. Accordingly, the dissenting judge felt the court should affirm the judgment below. Id. at 22.

Following the decision by the United States Court of Appeals for the First Circuit, the Trustee made a Motion for Reconsideration and Request/Suggestion of En Banc Consideration. The Trustee argued that the Court of Appeals ignored accepted rules of appellate procedure by considering issues of the Trustee's behavior which were not raised as issues below, and by using a stipulated record to resolve those new issues when the parties did not originally intend the record to be used for those purposes. Memorandum of Law for Petitioner at 1-5, Bezanson v. Metropolitan Ins. and Annuity Co., Nos. 91-1306, 91-1357 (1st Cir. Dec. 13, 1991). The Trustee also argued that a rehearing should be granted because the Court of Appeals' holding would have serious and detrimental implications for both federal bankruptcy law and Maine insurance

law. Id. at 6-7. Finally, the Trustee argued that the court's holding regarding the effect of the lapse notice was inconsistent with decades of Maine common law. Id. at 7-8. The Trustee requested that a rehearing be granted, in which if there remained a concern over extending the policy until the time of death under the facts of this case, that the court of appeals should certify the issue to the Supreme Judicial Court of Maine, sitting as the Law Court, pursuant to the available certification procedure. Id. at 9-10. As an alternative, the Trustee requested the Court consider the issue en banc.

The Court of Appeals denied the Trustee's motion. The Court stated that the Trustee's arguments regarding abuse of accepted appellate procedure were moot because, although two grounds for its decision apparently were offered, the court's holding regarding the "three times the original grace period" rule was the determinative basis for the court's decision. Similarly, the court denied the Trustee's suggestion for a rehearing en banc. The court did not respond to the Trustee's other arguments.

The Trustee now invokes the Court's jurisdiction, pursuant to 28 U.S.C. §1254(1), to grant this Petition for Certiorari.

REASONS RELIED ON FOR ALLOWING THE WRIT

I. The Court Should Review the First Question in Order to Prevent Abuse of the Erie Doctrine and to Clarify How Courts of Appeals Should Exercise De Novo Review of District Court Determinations of Unsettled State Law.

Resolving how a federal court of appeals should proceed in a diversity action when the state common law question is unsettled, involves special and important considerations of federal-state comity. In Erie Rail Co. v. Tompkins, 304 U.S. 64 (1938), this Court interpreted the Rules of Decision Act, 28 U.S.C.A. § 1652, to include decisions of a state's highest court, thereby rejecting the notion that there could be a general federal common law which displaced applicable state law in diversity actions. Since that decision, it has become axiomatic that "Erie mandates that a federal

court sitting in diversity apply the substantive law of the forum state, absent a federal statutory or constitutional directive to the contrary." Salve Regina College v. Russell, 111 S. Ct. 1217 (1991). When a federal court fails to apply the Erie mandate, its action encourages forum shopping and the inequitable administration of the law, results which implicate the fundamental nature of the federal-state relationship. See, id. at 1222.

A. The First Circuit Court Incorrectly Applied the De Novo Standard Required By This Court In Salve Regina College v. Russell

In Salve Regina College v. Russell, this Court updated the Erie doctrine by holding that a federal court of appeals must review de novo a federal district court's determination of state law in a diversity action. Id. at 1221. Prior to this decision, the federal courts of appeal and this Court had "traditionally given special consideration or 'weight' to the district judge's perspective on local law." Id. at 1226 (Rehnquist, C.J. dissenting). Such deference was thought to be particularly appropriate in cases where the state law was unsettled. In such cases, the federal district court's task is "to try to predict how the highest court of that State would decide the question." Id. (Rehnquist, C.J., dissenting). The Court in Salve Regina College, however, rejected the deferential review standard, reasoning that resolution of the state law issue was a question of law, and the federal courts of appeals are structurally well suited to the accurate rendering of questions of law. Id. at 1221. Thus, this Court concluded that independent appellate review "best serves the dual goals of doctrinal coherence and economy of judicial administration." Id.

Despite rejecting the notion of appellate deference to a federal district court's interpretations of state law, the Court in Salve Regina College was quick to point out that the district court's determination was still to play a role in the federal court of appeals' de novo review. The Court pointed out that "[i]ndependent appellate review necessarily entails a careful consideration of the

district court's legal analysis, and an efficient and sensitive appellate court at least will naturally consider this analysis in undertaking its review." Id. Indeed, the Court conceded that "[i]f the court of appeals finds that the district court's analytical sophistication and research have exhausted the state-law inquiry, little more need be said in the appellate opinion." Id. at 1222. In the Court's view, the bottom line was that independent review "does not admit of unreflective reliance on a lower court's inarticulable intuitions. Thus, an appropriately respectful application of de novo review should encourage a district court to explicate with care the basis for its legal conclusions." Id.

In the present case, the United States Court of Appeals for the First Circuit failed to follow the guidance of this Court in Salve Regina College for conducting a de novo review. The court of appeals failed to give careful consideration to the district court's legal analysis. The district court followed the direction of this Court in Salve Regina College by carefully explicating the basis for its legal determination of unsettled Maine law, rather than relying on inarticulate intuition. See Bezanson, Dist. Ct. slip. op. at 8. The district court also correctly applied the Erie doctrine by attempting to predict how the Supreme Judicial Court of Maine, sitting as the Law Court, would resolve the state law issue. The district court relied on four related cases decided by the Law Court, a district court of Maine decision, and a leading treatise. See, id. at 7-10 (discussing Coastal Sav. Bank v. Arkwright-Boston Mfrs. Mutual Ins. Co., 686 F. Supp. 17, 20 (D. Me. 1988), Baybutt Const. Corp. v. Commercial Ins. Co., 455 A.2d 914, 921 (Me. 1983), Bragg v. Royal Ins. Co., 98 A. 632 (Me. 1916), Clark v. Ins. Co. of North America, 35 A. 1008 (Me. 1896), 17 G. J. Couch, Cyclopedia of Insurance Law §§ 67:130, 67:155 (2d. ed. 1983)).[2] Based upon this

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[2]For the principle that in Maine ambiguous policies should be strictly construed against the insurer, see also Ray v. Blue Alliance Mut. Ins. Co., 594 A.2d 1110, 1111 (Me. 1991, Patrons Mut. Ins. v. Rideout, 411 A.2d 673, 676 (Me. 1980), Shaw v. Home Ins., 82 A.2d 96, 97 (Me. 1931), Barnes v. Dirigo Mut. Ins., 122 Me. 486, 490 (1923).

review of applicable law, the district court held that under Maine law the failure of Metropolitan to send a lapse notice to the Trustee resulted in continuance of the policy until the time of death of the insured. See id. at 12. Despite this thorough and sophisticated analysis of state law, the court of appeals peremptorily dismissed the lower court's finding, commenting that the district court cited nothing to support its position. Bezanson, Ct. of Ap. slip op. at 11.

B. The First Circuit Violated Applicable Principles For Determining State Law, And Departed From the Consensus Among Federal Courts, by Fashioning Its Own Rule Rather Than Predicting How The Maine Law Court Would Determine The State Law Issue

In addition to providing guidance for applying the de novo review standard, the Court in Salve Regina College addressed how a federal court of appeals should resolve issues of unsettled state law. The Court stated that, generally:

> In decisions after Erie, this Court made clear that state law is to be determined in the same manner as a federal court resolves an evolving issue of federal law: "with the aid of such light as [is] afforded by the materials for decision at hand, and in accordance with the applicable principals for determining state law."

Id. at 1218 (quoting Meredith v. Winterhaven, 320 U.S. 228 (1943). It follows, therefore, that the task of the federal court of appeals, as with the federal district courts, should be to predict how the highest court of a particular state would decide its question of state law.

The United States Court of Appeals for the First Circuit, however, made no attempt to predict how the Maine Law Court would determine the state law issue. The court of appeals characterized the determination of the district court as a "harsh, and most unreasonable rule." Id. However, the court of appeals did not find, nor

did it have any basis for finding that the rule enunciated by the district court was inconsistent with Maine law, despite its purported unreasonableness. Instead, the court of appeals went on to formulate its own arbitrary rule, based not on an independent review of Maine law, but on its own view of reasonableness. The court held that "three times the original grace period should give an owner with a bona fide intent to continue his policy sufficient time." Id. at 12. The court cited no authority from Maine nor elsewhere to support its rule, nor did it attempt to claim that its resolution of the state law issue was a prediction of how the Law Court would determine the issue. Furthermore, there is no indication anywhere in Maine law that characterizations of the Trustee's lawful business conduct, clearly important to the court of appeals, see, e.g., id. at 13 (concluding that the Trustee "was not even a bona fide forgetter" and was engaged in business "opportunism"), id. at 16 (describing the Trustee's "desire to play it both ways" and the "irony of his incompetence"), would even be relevant under Maine Law. Thus, in direct contravention of the Erie doctrine, and in an abuse of the independent appellate review required by this Court in Salve Regina College, the court of appeals reversed the district court and in the process created its own general federal common law.

The Court in Salve Regina College made clear that the purpose of independent appellate review of state law claims is to avoid creating a "dual system of enforcement of state created rights, in which the substantive rule applied to a dispute may depend on the choice of forum." Id. at 1222. The Court noted "[i]n a series of cases decided soon after Erie...that the appellate courts had applied general federal law instead of the law of the respective states, and remanded to the courts of appeals for consideration of the applicable principals of state law." Id. at 1223. Today, the consensus among the federal courts is that the way to avoid the creation of general federal common law in a diversity action is to predict how the state court would decide the state law issue. See, e.g. Wilson v. Asten-Hill Mfg. Co., 791 F.2d 30 (3rd Cir. 1986), Gearhart v. Uniden Corp. of America, 781 F2d 147 (8th Cir. 1986), Weiss

v. United States, 787 F.2d 518 (10th Cir. 1986). More importantly, when the state law is unsettled, most federal courts believe that the Erie doctrine requires that federal courts not impose their own preferences on what the law of the state ought to be. See, e.g. Robertson v. Allied Signal, 914 F.2d 360 (3rd Cir. 1990), rehearing denied (role of the federal court is not to form or create state law, but to decide the case as it believes state's highest court would), Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 397-398 (5th Cir. 1986), cert. denied 478 U.S. 1022 (federal court must not do merely what it thinks best, but do what it thinks the state's highest court would deem best), Brown v. Courier Herald Pub. Co., Inc., 700 F. Supp. 534 (S.D. Ga. 1988)(federal court may not adopt its own policy preference, but must choose rule it believes state's highest court is likely to adopt), Meadow Limited Partnership v. Heritage Sav. & Loan Ass'n., 639 F. Supp. 643 (E.D. Va. 1986)(federal courts must determine rule that state would follow, not fashion a rule which an independent federal court might consider best). Furthermore, at least one circuit has recently even expressed a reluctance to expand state law by predicting trends in state court decisions. See, Shaw v. Republic Drill Corp., 810 F.2d 149 (7th Cir. 1987), 19 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure, §4507 (1982). The First Circuit Court of Appeals in the present case, however, has broken with this Court and with the majority of federal courts by imposing its own view of the rule to be applied in this diversity case without regard to how the Maine Law Court would resolve the state law issue.

Ironically, in arriving at its rule of general federal common law, the court of appeals engaged in a line of reasoning that is in conflict with developments in federal bankruptcy law. The court of appeals contended that "[i]t might be a short answer to this case, though one that we need not make, that where plaintiff had made no formal request for a change of address on the policy records, it was legally proper, and sufficient, [for Metropolitan] to mail as it did." Bezanson, Ct. of Ap. slip op. at 5, n.1. The court returned to this theme later in its opinion:

> Even if the reason suggested in note 1, ante is insufficient, we do not believe that plaintiff, who had never withdrawn his promise to sue for the surrender value of the policy, was legally entitled to a notice, or a copy of a notice, of lapse for nonpayment of premium being sent to an address other than the address of record on the policy.

Id. at 10. Both of these contentions, however, run counter to the principle that property rights to an insurance policy owned by a debtor pass by law to the Trustee as an asset of the bankruptcy estate. See Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 352 (1986), Counties Contracting & Const. v. Constitution Life, 855 F.2d 1054, 1057 (3rd Cir. 1988), In Re No. 1 Con-Struct Corp., 88 Bankr. 452, 453 (Bankr. S.D. Fla. 1988), Mutual Trust Life Ins. v. Weinyess, 309 F. Supp. 1221, 1226 (D. Me. 1970).[3] Nonetheless, the court of appeals used its belief that the Trustee should not be entitled to notice, as additional justification for creating its general federal common law rule, the effect of which was to deny the Trustee of the proceeds of the policy. If the court of appeals reasoning is allowed to stand, it could have serious and deleterious effects on the development of federal bankruptcy law in the First Circuit.

In Salve Regina College, this Court declined "the invitation to assume that courts of appeals craft their opinions disingenuously." Id. at 1223. However, when this Court is faced with an actual abuse of the Erie doctrine, the Court should take the opportunity to rectify the damage to federal-state relations. Furthermore, coming in the wake of this Court's decision in Salve Regina College, and with its potential impact on federal bankruptcy law, the present case has serious repercussions beyond its four corners. The Court must ensure that the requirement of independent appellate review of district courts' resolution of state law is not misconstrued as an

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[3]Recognizing this, the district court concluded that insurance "[p]olicy requirements such as the one governing change of ownership cannot stand in the way of this principle of bankruptcy law." Bezanson, Dist. Ct. slip op. at 11.

invitation to exercise pre-Erie perogative by courts of appeals unhappy with the rule fashioned below. The first question offered for review in this case gives the Court the opportunity to clarify how federal courts of appeals should exercise their de novo standard of review of district court determinations of unsettled issues of state law.

II. The Court Should Review the Second Question in Order to Clarify the Standard Governing the Use of Certification Procedures By Federal Courts of Appeals, Thereby Promoting Federal-State Comity and Adherence to the Erie Doctrine

Resolution of when a federal court of appeals in a diversity action should certify a state law issue to the highest court of the state involves special and important considerations of federal-state relations. Nearly twenty years ago, in one of its first opinions responding to a certified question from the Federal District Court for the District of Maine, the Supreme Judicial Court of Maine, sitting as the Law Court, addressed this precise question:

> The problem, therefore is not whether the question of state law shall be answered but who shall answer it, the federal or state Court?
>
> In such aspect, apart from a most fundamental principle of "our federalism"—that the state court of last resort is alone the supreme arbiter of the substantive content of the law of the State—a concern to promote federal-state comity would counsel that, wherever reasonably possible, the state court of last resort should be given opportunity to decide state law issues on which there are no state precedents which are controlling or clearly indicative of the developmental course of the state law. Such approach would (1) tend to avoid the uncertainty and inconsistency in the exposition of state law caused when federal courts render decisions of state law which have an interim effectiveness until the issues are finally settled

> by the state court of last resort; and (2) minimize the potential for state-federal tensions arising from actual, or fancied, federal court efforts to influence the development of state law.

White v. Edgar, 320 A.2d 668, 675 (Me. 1974) (Wernick, J.). In recognition that certification is necessarily a cooperative procedure, the Law Court continued:

> Since certification is an instrumentality which achieves these objectives while simultaneously avoiding the disadvantages produced by federal abstention (as a practice calculated to attain similar goals), in the situation in which a decision of a question of state law is necessary to a decision of the federal merits of a cause pending in the federal court, it is, and will continue, a strong policy of this Court, as conducive to a sound federalism and the promotion of harmonious relations between federal and state Courts, to implement the certification process afforded by 4 M.R.S.A.§ 57 in the fullest scope consistent with this Court's proper functioning.

Id. at 675-76. The comments by the Maine Law Court have retained their relevancy today, and form the background against which this question is offered for review.

A. The Court's Emphasis In Salve Regina College v. Russell on Decisional Accuracy Requires The Court To Update Its Earlier Standard On Use of Certification Procedures

Contemporaneously with the Maine Law Court's opinion in White, the United States Supreme Court stated that use of a certification procedure in a given case by the federal court of appeals "rests in the sound discretion of the federal court." Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974). That approach to the issue, however, is no longer adequate to provide the federal courts with consistent guidance in the application of the Erie doctrine. Since the time of the Court's decision in Lehman Bros., nearly thirty

states have adopted certification procedures. See 12 Uniform Laws Annotated 49 (West Supp. 1991).

This growth in the availability of certification, coupled with the overly broad discretionary standard of this Court, has caused inconsistency among the circuits on when certification should be used. Furthermore, the need for clarifying when a federal court of appeals should resort to a certification procedure was both heightened and invited by this Court's decision in Salve Regina College v. Russell, 111 S.Ct. 1217 (1991). Failure to address this issue now will contribute to ongoing damage to federal-state relationships.

In Salve Regina College v. Russell, this Court held that a federal court of appeals should review de novo a federal district court's determination of State law in a diversity action. Id. at 1221. In so doing, this Court rejected the deferential standard of review embraced by the majority of the federal courts of appeals for reviewing federal district court determinations of state law. The Court reasoned that independent appellate review promotes "decisional accuracy," which is at the heart of the Erie doctrine and the goal of doctrinal coherence. Id.

This Court's renewed emphasis on decisional accuracy at the federal court of appeals level necessarily requires review of the certification standard. If de novo review by a federal court of appeals is to serve as a check on the creation of "a dual system of enforcement of state-created rights, in which the substantive rule applied to a dispute may depend on the choice of the forum," id. at 1222, the federal court of appeals has a greater obligation to correctly predict how the highest court of the state would decide the question. Where the law of the state is unsettled, and the court of appeals can no longer defer to the district court's resolution of the issue, certification becomes an increasingly important procedure available to the court of appeals to make an accurate decision. The approach to certification enunciated by thisCourt in Lehman Bros., however, no longer satisfies the need for a consistent approach to use of certification by the federal courts of appeals.

The Court in Salve Regina College invited an opportunity to update its standard on the use of certification procedures. The Court in Salve Regina College recognized that where the state law determinations of the federal court of appeals and the federal district court diverge, "the choice between these standards of review is of no significance if the appellate court concludes that the district court was clearly wrong." Id. at 1224. Following this comment, the Court raised the certification issue in footnote 4.

> Of course, a question of state law usually can be resolved definitively if the litigation is instituted in state court and is not finally removed to federal court, or if a certification procedure is available and is successfully utilized. Rhode Island provides a certification procedure. See, Rhode Island Supreme Court Rule 6 (1989).
>
> See, however, Lehman Bros. v. Schein, 416 U.S. 386, 390-391 (1974) ("We do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory. It does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism. Its use in a given case rests in the sound discretion of the federal court") (footnote omitted).

The footnote highlights the tension created by the Court's holding in Salve Regina College and its earlier approach to certification in Lehman Bros.. On the one hand, certification allows for definitive resolution of a state law issue, especially where the federal court of appeals and the federal district court differ in their state law determinations. On the other hand, certification has traditionally been left to the discretion of the federal court of appeals. Thus, the Court's comments in the footnote make clear this Court's need to articulate guidelines for the use of certification by the federal courts of appeals in order to reconcile the goal of decisional accuracy with the role of judicial discretion.

B. As Demonstrated By The Use Of Certification Procedures When A State Statute Is Involved, The Court Can Formulate Guidance For The Use Of Certification When State Common Law Issues Are Involved, Without Unduly Restraining Judicial Discretion

Despite the Court's comment in Lehman Bros. regarding discretionary use of certification procedures, the Court has not refrained from providing direction to the federal courts for use of certification when the interpretation of state statutes or ordinances is involved. Indeed, since the use of certification procedures first became available, this Court has shown a clear preference for certification in order to avoid rendering unnecessary federal constitutional decisions. In Clay v. Sun Insurance Office, 363 U.S. 207 (1960), this Court reversed the Court of Appeals for the Fifth Circuit because the court of appeals decided a potentially unnecessary constitutional question without first certifying to the state court issues dealing with application of the state's statute. This Court, rather than leaving the issue of certification to the federal court of appeal's discretion, decided that:

> While both questions not disposed of by the Court of Appeals are questions of local law, the question whether under Florida law § 95.03 is applicable to this contract is one on which the state court's determination is controlling. But, as the Court of Appeals indicated, it could not, on the available materials, make a confident guess how the Florida Supreme Court would construe the statute. The Florida Legislature, with rare foresight, has dealt with the problem of authoritatively determining unresolved state law involved in federal litigation by a statute which permits a federal court to certify such a doubtful question of state law to the Supreme Court of Florida for its decision. Even without such a facilitating statute we have frequently deemed it appropriate, where a federal constitutional question might be mooted thereby, to secure an authoritative state court's determination of an unresolved question of its local law.

Id. at 212 (citations omitted). (Justice Douglas, who sharply dissented on the certification issue in Clay, later moderated his view by writing the very approving opinion of certification in Lehman Bros..) This Court's policy of prescribing the appropriate use of certification when state statutes are involved has been followed and consolidated in subsequent cases. See Bellotti v. Baird, 428 U.S. 132 (1976), Elkins v. Morino, 435 U.S. 647 (1978), Brocket v. Spokane Arcades, 472 U.S. 491 (1985) (O'Connor, J., concurring), American Booksellers v. Virginia, 484 U.S. 383 (1988). Thus, the Court's decisions formulate a strong standard governing use of certification when state statutes are involved.

The Court should grant certification in this case to clarify the appropriate standard of certification by a federal court of appeals when unsettled questions of a state's common law is involved. Indeed, an accurate reading of Lehman Bros. v. Schein indicates that this Court never intended to leave the use of certification procedures to the unfettered discretion of the federal courts. In Lehman Bros., despite stating that the use of certification in a given case rests within the discretion of the federal court, the Court nonetheless held that resort to certification was particularly appropriate when the state common law issue was novel, the state law was unsettled, and the federal court judges were "outsiders" to the state whose law was being applied. Id. at 391. Having articulated this guidance for the use of certification, the Court vacated and remanded the case to the court of appeals to reconsider whether the controlling issue of state law should be certified to the state supreme court pursuant to the state's certification procedure. Id. at 391-92. Thus, while the Court in Lehman Bros. declined to make the use of certification procedures mandatory, the Court did begin to articulate the parameters within which the federal court of appeals could exercise their discretion.

Since Lehman Bros. v. Schein was decided, most of the lower federal courts have focused more on the extent of their discretion in resorting to certification procedures rather than the limits to their discretion in so doing. This may be due to the note of caution

sounded by then Justice Renquist in his concurrence to Lehman Bros.. Justice Rehnquist thought it "appropriate to emphasize the scope of the discretion of federal judges in deciding whether to use such certification." Id. at 1745. In his view, the use of a certification procedure was "more a question of the considerable discretion of the federal court in going about the decision making process than it [was] a question of a choice trenching upon the fundamentals of our Federal-State jurisprudence." Id. at 1746. Thus, he was reluctant to join the majority's strong endorsement of certification.

Fear that by providing guidance this Court will unreasonably infringe on judicial discretion, however, is unjustified as demonstrated by the line of cases this Court has decided concerning the use of a certification procedure when a state statute is involved. While this Court has articulated a strong preference for certification in these cases, its use has not become mandatory, nor has it displaced judicial discretion. For example, in City of Houston v. Hill, 107 S. Ct. 2502 (1987), this Court held that the refusal by the United States Court of Appeals for the Fifth Circuit to employ a certification procedure was appropriate. Id. at 2514. Since in the court of appeals' view the state statute involved was not susceptible to any limiting construction, the court in its discretion could decline to certify the question. Id. Thus, the use of certification in this situation remains within the discretion of the court of appeals, as limited by this Court's clear standard.

Notwithstanding, his reluctance to endorse certification, Justice Rehnquist recognized the need to "reconcile the exercise of the jurisdiction which Congress has conferred upon the federal courts with the important considerations of comity and cooperative federalism which are inherent in a federal system, both of which must be subject to a single national policy within the federal judiciary." Id. at 1745. This concern for a single national policy is consistent with the goal of doctrinal coherence referred to by the court in Salve Regina College, and underscores the need for the Court to now emphasize the limits to the discretionary use of certification procedures, rather than the extent to that discretion.

C. The Current Lack Of Consistency Among The Federal Courts Defeats The Aims Of The Erie Doctrine, And Calls For The Formulation Of A New Standard Governing When To Certify

The lack of a national judicial standard governing the use of state certification procedures defeats the twin aims of the Erie doctrine; the lack of consistency from court to court on whether an unsettled question of state common law will be certified to the state's highest court encourages forum shopping and increases the inequitable administration of the laws. Recognizing this problem, the drafters of the Uniform Certification of Questions of Law Act (the Act) have concluded that it would be "eminently desirable that uniformity be achieved in this area." 12 U.L.A. 51 (1975) (Commissioner's Prefatory Note). As a first step in that direction, § 1 of the Act establishes two fundamental prerequisites to certification. First, the question of state law should be determinative of the cause pending in the certifying court. Second, it should appear to the certifying court that there is no controlling precedent in the decisions of the states highest courts. 12 U.L.A. 52 (1975). Beyond the two conditions, however, each of which is met in this case, the Act provides no additional guidance for when a Court of Appeals should certify a question to the state's highest court.

Nearly thirty states now have certification procedures resembling those set forth in the Act. See 12 U.L.A. 49 (West Supp. 1991). However, there is little consistency from federal district court to federal district court, or federal circuit to federal circuit, on when resort to certification procedures should be used. The federal courts, in the absence of any direction from this Court, have articulated their own factors to consider in determining whether to use a state's certification procedure. See, e.g. Croteau v. Olin Corp., 884 F.2d 45 (1st Cir. 1989) (parties must accept the federal court interpretation of State law, no entitlement to certification), Home Ins. Co. v. American Home Products Corp., 873 F.2d 520 (2nd Cir. 1989) (certification granted where state law issue is one of first impression, involves important public policy issues, and is likely to recur), Grattan v. Board of School Comm'rs of Baltimore City, 805 F.2d 1160 (4th

Cir. 1986) (certification allowed where novel issue of local law is involved), Fisher v. Bar Harbor Banking and Trust Co., 857 F.2d 4, cert. denied 489 U.S. 1018 (1988) (no certification granted where party seeking certification had instituted suit in federal court), Lavespere v. Niagara Mach. & Tool Works, Inc., 920 F.2d 259 (5th Cir. 1990) (certification not allowed where state law question was not sufficiently exceptional), Shakopee Mdewakanton Sioux v. City of Prior Lake, 771 F.2d 1153 (8th Cir.), cert. denied 475 U.S. 1011 (1985), Alaska Airlines, Inc. v. United Airlines, Inc., 902 F.2d 1400 (9th Cir. 1990) (certification granted where question was close, one of first impression, and the issue was important to Alaska in terms of comity), Armijo v. Ex Cam, Inc., 843 F.2d 406 (10th Cir. 1988) (certification within broad discretion of the federal court, not to be routinely invoked), Claussen v. Aetna Cas. & Sur. Co., 865 F.2d 1217 (11th Cir. 1989) (certification granted where similar clauses have been given various interpretations in other jurisdictions), Tidler v. Eli Lilly and Co., 851 F.2d 418 (D.C. Cir. 1988) (certification granted where a federal court is genuinely uncertain), Stefano v. Smith, 705 F.Supp. 733 (D.C. Conn. 1989) (no certification granted where there were no savings in time, energy or resources), Bowman v. Harford County, 684 F. Supp. 416 (D.C. Md. 1988) (no certification granted in view of the small amount of money involved), Cummins v. EG&G Sealol, Inc., 690 F. Supp. 134 (D.C. R.I. 1988) (certification allowed where forum State law is unclear and certification procedure exists). Thus, it is clear that this Court needs to clarify the standard for when a federal court of appeals should in its discretion certify an issue of state common law to the state's highest court in accordance with an existing certification procedure.

D. The Posture In Which This Case Comes Before The Court Is Ideal For Clarifying The Law Governing Use Of Certification Procedures

The present case presents this Court with an excellent opportunity to clarify the standard governing use of certification procedures. First, Maine has adopted a certification procedure. The Maine

Code provision governing activities of the Maine Law Court provides in relevant part:

> When it shall appear to the Supreme Court of the United States, or to any court of appeals or district court of the United States, that there are involved in any proceeding before it one or more questions of law of this State, which may be determinative of the cause, and there are no clear controlling precedents in the decisions of the Supreme Judicial Court, such federal court may certify any such questions of law of this State to the Supreme Judicial Court for instructions concerning such questions of state law, which certificate the Supreme Judicial Court sitting as a law court may, by written opinion, answer.

Me. Rev. Stat. Ann., Tit. 4, § 57 (1989). See also M. R. Civ. P. 76(B) (Certification of Questions of Law By Federal Courts To The Law Court). The procedure has previously been invoked successfully by both the District Court for the District of Maine and the United States Court of Appeals for the First Circuit, and has been supported by the Maine Law Court. See, e.g., Hiram Ricker & Sons v. Students Int'l Mediation Soc'y, 501 F.2d 550 (1st Cir. 1974), Gagne v. Carl Bauer Schraubenfabrick, 595 F. Supp. 1081 (D. Me. 1984), Pierce v. Secretary of U. S. Department of Health, Education and Welfare, 302 F. Supp. 508 (D. Me. 1969), In Re Richards, 253 F. Supp. 913 (D. Me. 1966), Hiram Ricker & Sons v. Students Int'l Meditation Soc'y, 342 A.2d 262 (Me. 1975), White v. Edgar, 320 A.2d 668 (Me. 1974). Thus, procedurally there is no reason why the First Circuit should decline to use Maine's certification procedure.

Second, the court of appeals has indicated that the two commonly accepted prerequisites for use of any state certification procedures are met in this case. In its Order denying the Petitioner's Motion for Rehearing/Suggestion for holding a Rehearing En Banc, the court of appeals made clear that resolution of the state law issue was solely determinative of the case. Furthermore, in its Opinion, the court of appeals clearly found that state law was

uncertain on the issue. The court noted that "plainly, Maine takes many views regarding nonpayment of premium." Bezanson, No. 91-1306 at 11. Indeed, in light of this view, the rule created by the court was the equivalent of a judicial legislative enactment imposed on Maine insurance policies.[4] However, the court stated that it was "aware of no law anywhere supporting the position" adopted by the District Court. Id. Similarly, the court of appeals was unable to cite any Maine case, scholarly Maine commentary, or academic treatise in support of the rule which the court of appeals adopted. Thus, there is no obstacle in the way of resorting to a certification procedure in this case.

Finally, the federal district court did all that was required of it by Salve Regina College. The district court conducted a sophisticated and thorough review of state law in deciding the state law issue. It explicitly outlined the basis of its finding, rather than relying on inarticulate intuition. The First Circuit, however, abusing the de novo standard of review required by this Court in Salve Regina College, and over the thoughtful dissent of one member of its panel, rejected the federal district court's determination of state law. Thus, the issue of when to certify is separated from any question regarding loose reasoning by the lower court. As a result, the posture in which this case comes before this Court is ideal for resolving the question proposed for certiorari.

Dated: April 1, 1992

U. Charles Remmel, II
Attorney for Petitioner

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[4]Contrast, e.g., the actual legislative enactments from other states regarding justifiable time to excuse an insurer's failure to send a notice of lapse required under a policy: New York (1 year) N.Y. Ins. Law §3211 (McKinney 1985 & Supp. 1992); Tennessee (6 months) Tenn. Code Ann. § 56-7-113 (1989); Kansas (6 months) Kan. Stat. Ann. § 40-410 (1986); Massachusetts (3 months) Mass. Gen. Laws Ann. Ch. 175, § 110B (West 1987)

APPENDIX

United States Court of Appeals
For the First Circuit

No. 91-1306

DENNIS G. BEZANSON, TRUSTEE FOR
MEDOMAK CANNING COMPANY, INC.,
Plaintiff, Appellee,

v.

METROPOLITAN INSURANCE AND ANNUITY COMPANY,
Defendant, Appellant.

No. 91-1357

DENNIS G. BEZANSON, TRUSTEE FOR
MEDOMAK CANNING COMPANY, INC.,
Plaintiff, Appellant,

v.

METROPOLITAN INSURANCE, ET AL.,
Defendants, Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE
[Hon. D. Brock Hornby, U.S. District Judge]

Before
Campbell, Circuit Judge,
Aldrich, Senior Circuit Judge,
and Selya, Circuit Judge.

Alvin Pasternak with whom Sherry Laird and William J. Toppeta were on brief for appellant.

R. Terrance Duddy with whom U. Charles Remmel, II and Kelly Remmel & Zimmerman were on brief for appellee.

December 13, 1991

ALDRICH, Senior Circuit Judge. This is an action by plaintiff Dennis G. Bezanson, trustee in bankruptcy (Chapter 7) of Medomak Canning Co., Inc., on a policy of insurance issued by defendant Metropolitan Insurance and Annuity Co. on the life of Medomak's late president, Bernard J. Lewis. Medomak is the named owner and beneficiary. Lewis died on May 27, 1989. Possibly because of the amount involved ($500,000), with some substantial questions both sides include a number of contentions that can only be thought of as far out. First the facts.

No semi-annual premium had been paid since plaintiff had been appointed Medomak's trustee in April, 1986. However, under the policy terms an interest-bearing "accumulated fund," or "surrender value," would maintain the policy by a fractional premium deduction on the fifth of each month until the fund was exhausted. Because the interest earned by the fund was variable, the exact exhaustion date could not be predicted in advance. Consequently the policy provided that when exhaustion did occur the policyowner was to be given notice of lapse, and 61 days grace to make a payment, during which time the policy would continue in force automatically. The policy lapsed for an insufficient fund on November 5, 1988. Defendant sent the 61 day notice to Medomak's Post Office box named in the policy, and not to plaintiff trustee—who failed to visit the box and therefore did not receive it. Plaintiff did not pay thepremium, and, by its terms, the policy finally terminated on January 5, 1989.

After Lewis died on May 27, 1989 defendant rejected plaintiff's claim for the policy proceeds and plaintiff brought suit. The court held that to mail the lapse notice to the Medomak box, addressed to Lewis, rather than to Medomak Canning Corp., was proper, but that the notice, or a copy, should have been sent to plaintiff at his office address. In default of this it held the time to pay the premium was extended indefinitely, and entered judgment for plaintiff. Defendant appeals. We reverse.

Before the three principal questions, we consider lesser ones that are readily disposable. Those raised by defendant are,

a) That plaintiff lacks standing to sue. On a mishmash of arguments, apparently based on the fact that plaintiff had attempted to

surrender the policy, and that at one time it had been aassigned as security for a loan, and with appeals to equity, defendant would overlook the fact that plaintiff, as trustee, had title to the policy. In re O'Neill Enterprises, 547 F.2d 812, 815 (4th Cir. 1977); In re Cooperativa Cafeteros De Puerto Rico, 57 B.R. 952, 955 (D.P.R. 1984. Defendant exhibits no embarrassment that it offers no suggestion as to who has standing to sue if plaintiff does not.

b) That there are no consequences of failing to give a notice of lapse. Concededly, the policy states no consequences. What they may be is a question we will come to, but we are surprised that Home Office counsel would argue there are none, leaving defendant's promise a meaningless gratuity, indeed, as so interpreted, a misleading one.

c) That an owner has a burden of showing he would have paid the premium had he received the notice. This, too, cannot be true as a general proposition. Whether there may be special considerations here, we will come to.

Defendant is not alone in reaching for straws. According to plaintiff,

d) Defendant sent the lapse notice to the wrong address in order to avoid a continuance of the policy. Insurance companies exist on policies, not lapses. Plaintiff points to the fact that defendant knew Lewis had a form of cancer, apparently arrested. However, defendant knew this when it wrote the policy. Plaintiff was closer to Lewis than was defendant, and, rather than seek to continue, he was trying to surrender it. Indeed, if defendant was apprehensive about his health, Lewis, to whom the notice was addressed, would be the one best aware if it was failing.

e) From as early as September, 1987 defendant "began treating Bezanson as the Policyowner." Clearly it did the opposite. Rather than recognize plaintiff as owner, when he sought to surrender the policy defendant refused, sending him a form that showed the owner to be Medomak Canning Company, P.O. Box 4566, Portland, Maine 04112, with a letter stating that "it must be signed by the owner of the policy." An attorney who had been a bankruptcy trustee "several thousand" (sic) times should have realized that defendant was

not regarding him as the owner. This indication was given, see post, three times.

f) It was insufficient to address the lapse notice to Lewis, rather than to Medomak Canning Corp. Plaintiff's criticizing the court's finding seems particularly ingenuous since he did not go to the Medomak box, or take steps relating to any mail addressed thereto, and, therefore, would not have received mail, however addressed, unless through the courtesy of Lewis, who retained access.[1]

To turn to the facts in more detail, on October 7, 1987, on his personal letterhead as Attorney at Law, plaintiff wrote defendant's local sales representative, Cummings, enclosing a certificate of his appointment as acting Trustee of Medomak's bankruptcy estate and requesting information about the policy "owned by the above-referenced Debtor." Unmindful that Cummings, as a layman, might not read this to say the title to the policy was now in plaintiff, as distinguished from the "above-referenced Debtor," plaintiff did nothing to elucidate. Not surprisingly, when Cummings obtained an information sheet from the Home Office (headed with Medomak's P.O. Box 4566) he sent it to plaintiff, at plaintiff's address, with "the necessary papers in regards to assignment," a clear indication, as we have said, of a belief that, until assigned, plaintiff was not the owner. Cummings' letter stated that the accumulated fund would probably become insufficient by November, 1988, though possibly as early as July; the exact date to depend on the variable interest factor. This was confirmed by a formal, more detailed sheet, sent by defendant in January, 1988. Following receipt, on January 25, 1988 plaintiff sent Cummings, on a company form, a request for the surrender value, together with another cer-

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[1] In a well-considered opinion in In re Benny, 29 B.R. 754, 760-762 (N.D. Cal. 1983), the court held the trustee had a duty to obtain the bankrupt's mail. This would seem an expected duty of every trustee. A. Herzog & L. King, Collier Bankruptcy Practice Guide, ¶ 86.07 [1] (1991). It might be a short answer to this case, though one that we need not make, that where plaintiff had made no formal request for a change of address on the policy records, it was legally proper, and sufficient, to mail as it did.

tificate of his appointment, with a request that the check be made payable to him. This resulted in two letters from defendant's Home Office. The first requested further identification of the policy, and the second, under date of March 3, recited that the policy had been identified, and that the surrender request required "written consent from the Medomak Canning and the Canal Bank and Trust Company or an appropriate Court order." Plaintiff made no reply. On his deposition he was asked,

> Q. What steps, if any, did you take in response to that?
>
> A. Well, first, my response was couldn't understand why they wouldn't just surrender the cash value, and second of all, upon reading that they required the written consent of Medomak Canning, they already had that.... I am Medomak Canning. The trustee is Medomak Canning as a matter of law, and I signed the surrender in exactly that form.
>
> Q. Did you ever write Metropolitan saying—giving your position on why the things they were asking were not necessary?
>
> A. No, I didn't.
>
> Q. Did you ever seek any sort of a written consent from Key Bank [successor to Canal Bank] with respect to the release of any rights under the collateral assignment?
>
> A. No, because I didn't deem it was necessary.

On May 31 the Home Office wrote again, saying it had no reply to its March 3 letter, and that it was awaiting "the necessary information." On June 10, 1988 plaintiff wrote the Home Office to the effect that if his demand of January 25 for the surrender value was not complied with he would institute suit on behalf of the bankruptcy estate. To this, on July 18, the Home Office repeated its

request for written consents, and the matter lay there.

To return to plaintiff's deposition,

> Q. Why was it easier to bring suit against them instead of just getting signatures from Medomak and Key?
>
> A. If you have been a trustee for any period of time, one of the largest aggravations in your life is insurance companies, okay. They make the process, which should be very simple, very difficult. And I have had a lot of experience with insurance companies on this type of issue, among others, including coverage of bankruptcy, et cetera.

To go back a bit,

> Q. You have to balance your priorities and decide who gets your attention?
>
> A. What gets the most attention, sure, and a four thousand dollar claim versus other work that I had at that time was not high on this list of priorities.

Perhaps because he was thinking only in terms of the surrender check, for which he had given his address, plaintiff did not bother to fill out the part of the form providing space under REQUEST FOR CHANGE OF ADDRESS. At trial he testified he thought defendant would assume it from the fact he gave his address at the beginning of the form. Having in mind that defendant was a company doubtless doing business by computers with minimum hand work, it does not seem too much, when a party is given a form with a special place for requesting a change of address, to expect him to comply. However that may be, under no circumstances can we understand how plaintiff could sign his name directly under the printed statement that the policy was not assigned, and maintain thereafter the lack of need to obtain a release. The policy provided,

> Collateral Assignment—Your policy may be assigned as collateral. All rights under the policy will be transferred to the extent of the assignee's interest.

Assignments for security manifestly are not freely revocable.[2] Defendant could not deal with a person who, however titled, peremptorily claimed full rights, to the exclusion of the assignee-creditor. In the absence of fraud a trustee in bankruptcy has no more powers than the debtor. M. Rhodes, Couch on Insurance 2nd, § 63A:80 (rev. ed. 1983).

Actually, plaintiff settled with the assignee bank on March 7, 1988. He did not, however, bother to inform defendant even unofficially, let alone officially. Even if we overlooked what cannot be overlooked, that the release came long after January 25, 1988, there can be no merit in plaintiff's contention that he need not supply an assignee release because Cummings knew the assignee's counsel, who, presumably, had informed him of the discharge. No competent attorney should be "aggravated" by, or too busy to comply with, the wish of an insurer with a $500,000 policy, to have an executed release for its records, not simply a hearsay report.

Even if the reason suggested in note 1, ante is insufficient, we do not believe that plaintiff, who had never withdrawn his promise to sue for the surrender value of the policy, was legally entitled to a notice, or a copy of a notice, of lapse for nonpayment of premium being sent to an address other than the address of record on the policy. So far as defendant was concerned, plaintiff was through with the policy—it would be difficult to think of a clearer announcement. Since defendant did not recognize the surrender demand, concededly it was not excused from sending the lapse notice to the policyowner's address of record, but it should not lie in plaintiff's mouth to say it should do further.

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[2]This one provided to the assignee, "The sole right to surrender the Policy and receive the surrender thereof at any time provided by the terms of Policy and at such other times as the Insurer may allow."

If we are unduly hard on plaintiff here, defendant argued that even assuming the absence of proper notice, plaintiff was seeking an unreasonable extension of time in which to pay the premium. In rejecting this, the court said,

> Metropolitan argues that this result will have the effect of extending coverage on life insurance policies indefinitely. But insurers are free either to send out the required notice or to change the terms of their contract (if permitted by state law).

The state law to which the court referred are statutes relating to casualty, property, and accident and health insurance (24-A Me. RSA § 2739, 2908 and 3050), and accident and health court decisions, e.g., Clark v. Insurance Co. of North America, 89 Me. 26, 35 A. 1008 (1896). The reference is inapposite. Such policies normally call for automatic renewal, but with the insurer free to cancel if it gives advance notice. The court said that Maine does not have a lapse statute covering life insurance, but that it saw "no reason to distinguish life from casualty insurance for these purposes." This was not only to disregard the important distinction that ordinary life insurance policies are never cancelable by the insurer if the owner tenders the premium, but failed to note that Maine does have a statute for life insurance. 24-A Me. RSA § 2505, requires life policies to provide for 30 days grace after lapsing for nonpayment of premium, but, interestingly enough, requires no notice. We observe, incidentally, that § 2739 offers health insurers the right to terminate after nonpayment of the premium for three months, without notice, or in one month with notice. Plainly, Maine takes many views regarding nonpayment of premium. We think we should look to common law principles and not seek to draw analogies from statutes.

Apart from its construction and application of Maine statutes not apposite to this policy, the court cites nothing, and we are aware of no law anywhere supporting the position that failure to send a required notice of lapse will extend the coverage of any policy indefinitely. It would be a harsh, and most unreasonable rule. A

grace period, continuing the coverage free, here 61 days, results in a selection against the company that it has accepted. The policy owner can wait, without obligation, and decide, retroactively during that period, to, or not to, continue the insurance, depending on what develops. It is appropriate that there should be a further, penalty period for failure to give the owner the promised alert, but surely it would be extraordinary to say that he gets a free ride and retroactive choice forever; there must be a limit of reasonableness. Cf. Maine Mutual Fire Ins. Co. v. Watson, 532 A.2d 686, 689 (Me. 1987) ("[W]]hen no time for performance is specified in the contract, a 'reasonable time' is implied."). Under the court's rule forgetful, or dishonest, policyholders, long after lapse could claim, if a loss occurs, that they never received the notice even though they had. This could create a jury issue, with unlimited selection against the company. At a minimum a company could never know what reserves to set up against apparently lapsed policies.

Because of its ruling that there was no limit, the district court did not consider whether the actual period it allowed was within reason. Lewis died on May 27, 1989. May 5 would have been three times the 61 days grace period for the November payment that had been indicated to plaintiff as probable. Watson held that, where the facts are stipulated, what is a reasonable time is a question of law. but, in any event, what is the maximum reasonable must be such a question. We consider three times the original grace period should give an owner with a bona fide intent to continue his policy sufficient time.

Plaintiff, moreover, was not even a bona fide forgetter. Asked on his deposition what his plans had been with respect to his promised suit for the surrender value, his response was, in substance, when he got the time. Thinking better, he amended this by adding,

> I don't think I made any other decisions after June 10th, 1988, other than at some point I would be bringing suit against them, unless some other facts came to my attention that indicated to me that there should be another decision made.

(Emphasis supplied.) Quite clearly these facts were Lewis's health. Opportunism is unquestionably good business, but this is surely impermissible. In his affidavit plaintiff stated, "I depended on receipt of that [lapse] notice to trigger me to once again review Bernard J. Lewis' physical condition and to review, and depending on Mr. Lewis' condition, change my earlier decision to pursue the Policy cash surrender value." Obviously this meant the value as of January 1988, the date of the demand—when the policy lapsed it would have no value. Thus plaintiff was reserving to himself the right to choose freely, up to January 5, 1989, whether to receive the January 1988 accumulated value in cash, or to charge defendant with applying it to continue the policy for the year. This freedom was independent of any subsequent default, if there were such, respecting a lapse notice. On what proper basis could plaintiff have such a right? Yet it is to this heads-I-win, tails-you-lose, that the court added indefinite continuance.

Because we cannot agree with this we deal only briefly with the complicated principles of a bankruptcy trustee's duty regarding executory contracts. In Counties Contracting & Construction Company. v. Constitution Life Ins. Co., 855 F.2d 1054 (3d Cir. 1988), the bankruptcy trustee did not pay the premium during the grace period as extended by the Bankruptcy Act. In rejecting a rule that would "retain indefinitely the option to make a retroactive decision to carry insurance," the court held that if the trustee wanted to adopt the policy, he should obtain an order of authorization from the court. 855 F.2d at 1060. This was a reference to 11 U.S.C. § 365(d)(1), that provides that if the trustee does not apply within 60 days after the order for relief, an executory contract is "deemed rejected." In the case at bar plaintiff did nothing within 60 days. It is not too clear, however, as to what is an executory contract from the bankruptcy standpoint. In L. King, 2 Collier's on Bankruptcy ¶365.01 it is said, "The term 'executory' as applied to a contract is equivocal and quite possibly in the bankruptcy context has a rather more limited meaning than under state law." At the same time, "performance to some extent [must] remain due on both sides." Accord: In re Cochise College Park, 703 F.2d 1339, 1348 (9th Cir.

1983); In re A.H. Robins Co., Inc., 68 B.R. 705, 707 (Bankr. E.D. Va. 1986). This duality is what has produced the rule. The trustee may have an obligation to perform which he views as more burdensome to the estate than the revocation of the contract. If so, he may reject. Gloria Manufacturing Corp. v. I.L.G.W.U., 734 F.2d 1020, 1022 (4th Cir. 1984). The other party, however, needs prompt information of the trustee's decision. This second interest was well put in the report of the Senate Judiciary Committee. "This [60 day] provision will prevent parties in contractual or lease relationships with the debtor from being left in doubt concerning their status vis-avis the estate." S. Rep. No. 989, 95th Cong. at 59 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5844. Besides his business concerns, the creditor needs a rejection in order to file a timely claim against the bankrupt estate. In re Jolly, 574 F.2d 349, 351 (6th Cir. 1978), cert. denied sub nom., Still v. Chattanooga Memorial Park, 439 U.S. 929 (1978).

While plaintiff cites a number of bankruptcy court decisions involving casualty and property insurance stating that insurance is an executory contract in that there are obligations on both sides, In re Gamma Fishing Co., 70 B.R. 949, 951 (Bankr. S.D. Calif. 1987); In the Matter of Pester Refining Co., 58 B.R. 189, 191 (Bankr. S.D. Iowa 1985); In the Matter of B. Siegel Co., 51 B.R. 159, 161 (Bankr. E.D. Mich. 1985), insurance, perhaps particularly life insurance, where the insurer cannot refuse to renew, does not fit the conventional pattern. The policy owner, bankrupt or otherwise, has no obligation to pay premiums; he can stop at any time. He needs no court order. Correspondingly, the life insurer will never have a claim to file against the bankrupt, or concern as to the future. If the premium is paid when due, it will continue the policy; if it is not, it does not. Unlike a landlord, for example, advance notice of the policy owner's intentions is of no moment.

We need not pursue the legalities of executory contracts, however. In this case plaintiff clearly, even though defectively, attempted to reject the contract by demanding its surrender value. Defendant was continually willing to make payment, and the only reason plaintiff did not receive it was due to his own, persistent,

incompetence, or, perhaps his desire to play it both ways. We will not enforce that desire, or the irony of his incompetence entitling him to a recovery that is not merely a windfall, but a quite unreasonable result.

Reversed. Judgment to be entered for defendant.

Dissent follows.

SELYA, Circuit Judge (dissenting). This is a hard case hard in the sense that the law, when faithfully applied to the facts as supportably found below, requires us to grant relief to a groak-like plaintiff who scarcely seems deserving of it. But, because the court's result-oriented response to this pleasureless predicament makes a bad situation worse, I dissent.

I see no need for a lengthy exegesis. This is a diversity case—and if I am correct in my belief that state law has been wrenched into unfamiliar contours, then the Maine Supreme Judicial Court will likely have (or find) an opportunity to set matters straight before too much time has passed. Moreover, the court below wrote an extensive opinion which, in many respects, anticipates what might now be written in dissent. Withal, the majority's ambitious recension of the governing legal principles should not go unanswered.

The court's opinion, as I read it, hinges on a trio of dubious conclusions. First, my brothers say, in effect, ante at 59, that Metropolitan's mailing was legally sufficient to provide Medomak with due notice of the policy's demise. I disagree. It was Metropolitan which drafted the policy and included a right to notice as a precondition to lapse. On November 7, 1988, aware that Medomak was in bankruptcy and that Bezanson, as trustee, had assumed control over the company, the defendant attempted to satisfy this promise. It botched the job, addressing the envelope to:

Bernard J. Lewis
Box 4566
Portland, Maine 04112

Thus, the mailing was sent to the wrong person, at the wrong address, without providing any inkling that its contents pertained to Medomak or were business-related. Given that the defendant had earlier been (1) notified of Bezanson's role, (2) supplied with his correct address, and (3) asked to deal with him in Medomak-related matters (an invitation to which the defendant proved ame-

nable), the flaws seem not only fatal, but also inexcusable.[3] Indeed, because of its own conduct in corresponding on at least five occasions with Bezanson at the address he stipulated before sending the misdirected lapse notice, the defendant is likely estopped from now claiming that it need not have forwarded the notice to him at the new address. See Koren v. Secretary of State, 574 A.2d 895, 897 (Me. 1990) (a party may assert equitable estoppel when he justifiably relies to his detriment on an opposing party's misleading conduct).

The majority strives valiantly to shift the blame, pointing out that Bezanson never completed a change-of-address form. The policy, however, was written by Metropolitan. It provided not that an insured must notify the insurer of a new address on a company form prepared for that purpose, but that the insured might do so. Other clauses in the policy make it plain that the defendant knew how to write mandatory requirements. Its failure to write one in this instance left the insured free to send word of an address change in any manner reasonably calculated to furnish adequate notice. See generally Russell v. Starr, 239 P.2d 735, 736 (N.M. 1952) ("In the absence of statutory or policy provisions, no particular form of notice is necessary."); Couch on Insurance 2d, supra, § 67.138. Courts, after all, are to construe insurance contracts against the drafter, who is best situated to impart clarity into the linguistic quagmire in which such contracts are all too often embedded. See, e.g., Ray v. Blue Alliance Mut. Ins. Co., 594 A.2d 1110, 1111 (Me. 1991) (ambiguities in insurance policies are to be construed "strictly against the insurer").

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[3]The suggestion that the defendant should be excused from acting upon information contained in its own records because it was "doing business by computers with minimum hand work," ante at 8, cannot be taken seriously. The fact that an insurer is a large corporation, and computerized, does not absolve it from recording information properly, from complying with its contracts, or from the usual rules of respondeat superior. Moreover, that a corporation has sophisticated technology at the ready eliminates rather than produces any seeming unfairness in holding it to knowledge of what a search of its internal records would easily have revealed.

The majority is equally quick—and equally wrong—in castigating the plaintiff for not retrieving the notice, whatever mistakes were made in the mailing. See ante at 5 & n.1. Although it is true that a bankruptcy trustee has a duty to collect the estate's assets and that this duty encompasses an obligation to gather business correspondence received by the bankrupt, see In re Benny, 29 B.R. 754, 760-62 (N.D. Cal. 1983), the duty does not extend to reviewing personal items. Indeed, the few cases which have addressed this issue are consentient in their concern that bankruptcy trustees had best avoid impinging upon the privacy interests that are implicated when a trustee reads a bankrupt's personal mail. See, e.g., id. at 764-69; In re Crabtree, 37 B.R. 426, 428-29 (Bankr. E.D. Tenn. 1984). The rule seems to be that "the trustee shall refrain from opening the nonbusiness mail [of the bankrupt] whenever he can practicably identify it as such by examining the information on the envelope." Benny, 29 B.R. at 770. Here, the envelope made no reference either to Medomak or to Lewis' corporate capacity. Hence, it strikes me as odd to intimate that the plaintiff was under an obligation to open and read what appeared to be Lewis' personal mail.

The next conclusion that I deem problematic involves the plaintiff's bungled attempt to cash out the policy. Unlike my brothers, see ante at 9-10, I think this fact is irrelevant. Under Maine law, a consensual cancellation of an insurance policy, like the rescission of any other contract, can be effected only by mutual agreement. See Northeast Ins. Co. v. Concord Gen. Mut. Ins. Co., 461 A.2d 1056, 1059 (Me. 1983). The present case lacks the necessary element of mutuality. When Bezanson tried to redeem the policy for its cash value in 1987, Metropolitan rebuffed his overtures. Since the defendant did not agree to Bezanson's terms at the time the offer to cancel was made, the policy continued in force. I know of no legal theory which, in these circumstances, would permit the defendant to hold the plaintiff to his failed aspiration.

Last, and perhaps most disturbing, my brothers fashion a new rule, without a single citation to precedent in point, that an insurer's failure to send a contractually required lapse notice will be excused

unless the unnotified policyholder takes action, within a reasonable time, to restore that which he may not yet realize he has lost. This rule places the shoe on exactly the wrong foot. And in this case, moreover, application of the rule overlooks that the period of the plaintiff's inaction cannot, as a matter of law, be classified as unreasonable. Metropolitan told Bezanson in January of 1988 that, if certain assumptions as to interest and premium rates held, the policy would lapse around November, 1988, absent payment of additional premiums. Bezanson, who could read, knew that the lapse date was uncertain, that he would eventually receive a lapse notice, and that he would then have sixty-one additional days within which to act. Lewis died on May 27, 1989, no proper notice of lapse having been transmitted in the interim. I do not see how, on these facts, and given the imprecisions in the defendant's forecast, an appellate court can say as a matter of law that some imagined limit of temporal reasonableness was exceeded. Cf. Fortin v. Wilensky, 53 A.2d 266, 269 (Me. 1947) (applying clear-error review to finding of judge sitting without a jury; holding that question of what constitutes a reasonable time is, ordinarily, a mixed question that depends on the facts and circumstances of a particular case).

My brothers are understandably concerned about extending coverage forever, free of charge, if an insurer neglects properly to send a required notice of lapse. See ante at 11-12. I share this worry, but I suggest there are three rather powerful answers to it. First, insurers can be diligent in complying with the provisions of the policies they sell. Second, to the extent allowed by law, insurers can either refuse to provide lapse notices to policyholders, or in the alternative, insert prophylactic provisions such as prescribed procedures for changing addresses. Third, whatever extraordinary remedy might be justifiable in a truly horrendous case, this is certainly not such a situation.

I need go no further.[4] Believing, as I do, that the defendant was the author of its own misfortune, I would, rather than joining in an all-out effort to extricate the defendant from its self-dug hole, affirm the judgment below.

I respectfully dissent.

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[4]I do not think it useful to deal here with the defendant's argument that the policy was "deemed rejected," 11 U.S.C. § 365(d)(1), because it was not affirmatively accepted by the trustee within sixty days after the order for bankruptcy relief. Suffice it to say that my thoughts on this subject are along the same lines as intimated in the court's opinion, ante at 14-16.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DENNIS G. BEZANSON, TRUSTEE
FOR MEDOMAK CANNING COMPANY,
INC.,
Plaintiff

v. Civil No. 90-0018-B

METROPOLITAN INSURANCE AND
ANNUITY COMPANY,
Defendant

FINDINGS OF FACT AND CONCLUSIONS OF LAW

HORNBY, District Judge

The trustee for the bankruptcy estate of Medomak Canning Company, Inc. (Trustee) has sued Metropolitan Insurance and Annuity Company ("Metropolitan")[1] to recover $500,000 under a life insurance policy Metropolitan wrote on Medomak Canning Company, Inc.'s president, Bernard J. Lewis. Metropolitan maintains that the insurance policy had lapsed before Lewis' death. These are my findings of fact and conclusions of law on the stipulated record, Boston Five Cents Savings Bank v. Secretary of the Department of Housing and Urban Development, 768 F.2d 5, 11 (1st Cir. 1985).

[1] Metropolitan Insurance and Annuity Company is an affiliate of Metropolitan Life Insurance Company. The former issued the policy in question and is defending this case, while the latter issued the original policy in 1980. Both entities will be referred to collectively as "Metropolitan."

FINDINGS OF FACT

1. On March 6, 1980, Medomak Canning Company, Inc. ("Medomak") applied for a 5-year Renewal Term Policy with Metropolitan. Bernard J. Lewis ("Lewis") signed the application in his capacity as president of Medomak. On May 5, 1980, Metropolitan issued the policy for $500,000 on Lewis' life, listing Medomak as both the owner and the beneficiary. A Collateral Assignment to the Canal Bank & Trust Company of Portland ("Canal Bank") occurred on December 1, 1983.

2. On January 5, 1984, the policy was converted into a $500,000 Flexible Premium Life Policy, still insuring the life of Lewis with Medomak remaining both the owner and the beneficiary. Advance premiums on Flexible Premium Life Policies are credited to an accumulation fund, then deductions are made from the fund to cover the cost of insurance as it accrues. This particular policy required a $4,350 semi-annual advance premium to set up the accumulation fund, then monthly deductions were charged against the premium payment on the fifth day of each month.

3. On April 7, 1986, an involuntary Chapter 7 Bankruptcy petition was filed against Medomak in the United States Bankruptcy Court for the District of Maine. A trustee was named on April 23, 1986.

4. The Trustee began to explore the status of the policy in September 1987 and traded correspondence with Metropolitan representatives in Portland and New York for approximately the next ten months until July of 1988.

5. In October of 1987 the Trustee wrote to Metropolitan's Portland office requesting further information regarding the policy. He stated that he was Medomak's Trustee in bankruptcy and enclosed a certificate of his appointment. In November, Metropolitan gave the Trustee the information he had sought regarding the policy and informed him that there were "approximately another twelve months left of coverage.

6. On December 9, 1987, Metropolitan's Portland office wrote another Metropolitan department that "many legal questions relat-

ing to the policy were developing. The Portland office stated that the policy was on the life of Lewis and that Medomak was both the owner and the beneficiary of the policy. Additionally, it listed Plaintiff as the "acting trustee" for Medomak and gave his South Portland address.

7. In mid-January of 1988, the Trustee received the Policyholder Annual Statement addressed to Medomak Canning Co. at P.O. Box 4566, Portland, Maine 04112. It stated that "if no payments are made, your policy will end on the following dates: Assuming guaranteed interest and maximum cost of insurance rates = 07/1988 Assuming current rates = 11/1988 Minimum payment due = 715.01."

8. The Trustee wrote Metropolitan on January 25, 1988, enclosing a cash surrender request form for the policy signed in his capacity as Trustee for Medomak. Metropolitan informed the Trustee that under the terms of the policy[2], he had no right to a cash surrender until a written change of ownership notice was filed at Metropolitan's designated office and that the Collateral Assignment to Canal Bank prevented Metropolitan from complying with the Trustee's cash surrender request.

9. The Trustee renewed his request for the cash surrender value in June of 1988. He again stated that he was the acting Trustee for Medomak and made a demand for payment of the cash value of the policy as it existed at the time of his first written request in January. Metropolitan responded in July stating that:

> in order to cash surrender the policy, we will need written consent from Medomak Canning and the Canal Bank and Trust Company or an appropriate Court order.

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[2]The policy provides:

> **How to Change the Owner or the Beneficiary** —You may change the owner...of this policy by written notice or assignment of the policy. No change is binding on us until it is recorded at our Designated Office. Once recorded, the change binds us as of the date you signed it.

Stipulated Exhibit 4 at 8.

I regret we cannot comply with your request, however, in order for Metropolitan to avoid potential double exposure, we require the above information.

10. On July 5, 1988, Metropolitan sent a premium payment notice to Medomak Canning Co. at Box 4566 Portland, Maine 04112 informing Medomak that a $4,350 payment was due. No payment was made.

11. The Metropolitan policy provides:

Grace Period — If the accumulation fund on any monthly anniversary, minus any policy loan and loan interest, is less than the monthly deduction for that month, there will be a grace period of 61 days after that anniversary to pay an amount that will cover the monthly deduction. We will send you a notice at the start of the grace period. We will also send a notice to any assignee on our records.

If we do not receive a sufficient amount by the end of the grace period, your policy will then end without value.

If the insured dies during the grace period, we will pay the insurance proceeds minus any overdue monthly deduction.

12. On November 7, 1988, Metropolitan sent a notice to Bernard J. Lewis at Box 4566, Portland, Maine 04112 stating that the scheduled premium was $4,350, and that the minimum payment due to avoid lapse was $1,224.98. The notice stated:

Dear Policyholder;

The cash value of your flexible premium life policy is insufficient at this time to cover the payment that is now due. Unless the minimum due to avoid lapse shown above is received by 01/05/89, your valuable coverage under this policy will terminate.... So Please, send your payment today to assure your continued insurance coverage....

13. Two months later, on January 5, 1989, Metropolitan sent a final termination notice to Bernard J. Lewis at Box 4566, Portland, Maine 04112. This notice stated:

> Dear Policyholder:
>
> A short time ago we notified you that the available cash value of your flexible premium life policy was insufficient to cover the current premium charges. To date we have not received sufficient payment to keep your policy in force and your coverage terminated as of 01/05/89.

14. Mr. Lewis died of Hodgkin's disease on May 27, 1989.

15. The Metropolitan policy states that Metropolitan will pay proceeds to the beneficiary after receiving "proof of death and a proper written claim."

16. On November 14, 1989, the Trustee's attorney advised Metropolitan of Lewis' death and requested a check for the policy proceeds. Metropolitan declined to pay on the ground that coverage had lapsed.

17. The Trustee filed this action on January 23, 1990, seeking a declaration that (1) the policy was in effect when Lewis died, (2) the policy proceeds belong to the Trustee for Medomak, and (3) the Trustee is entitled to interest from the date of Lewis' death.

CONCLUSIONS OF LAW

A. Diversity jurisdiction exists under 28 U.S.C. § 1332 because the Trustee is a Maine resident, Metropolitan is a New York corporation, and the amount in controversy exceeds $50,000.

Notice as a Precondition to Lapse

B. Maine does not have a lapse statute covering life insurance.[3] Therefore, the terms of the policy govern.

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[3]Maine does have lapse statutes covering health insurance, 24-A M.R.S.A. § 2739 (three month grace period following non-payment of premiums unless the

C. Metropolitan argues that its specific agreement in the policy to send notice at the start of the grace period is not a precondition to the running of the grace period and the lapse of coverage. It argues that since the policy does not specifically provide what happens if the promised notice is not sent, to require notice as a precondition to lapse impermissibly adds a new term to the policy. But the policy does tell the insured that policy provisions can be conditional even though not explicitly stated as such:

> To make this policy clear and easy to read, we have left out many cross-references and conditional statements. Therefore, the provisions of the policy must be read as a whole. For example, our payment of the insurance proceeds (see page 5) depends upon the payment of sufficient premiums (see page 7).

This type of "plain English policy" is designed to do away with the extraneous and at times confusing language often found in insurance contracts. Thus, the fact that the policy does not explicitly condition lapse upon the giving of notice does not preclude such a relationship. Indeed, the value of a grace period would be substantially reduced if the insurer did not notify the owner it had begun to run. Under Maine law, "the crafty product of insurers who made the policy, selected its language and ordained its particular structure, should be interpreted most strongly against the insurer." Baybutt Construction Corp. v. Commercial Union Insurance Co., 455 A.2d 914, 921 (Me. 1983). Notice of the running of a the grace period is an important part of the policy, and the owner should be able to rely upon it. I conclude, therefore, that notice is a precondition to lapse of this policy.

D. Under Maine law, if a policy requires that notice be given prior to cancellation, a failure to give such notice keeps the policy

insurer has provided the insured with notice); property insurance, 24-A M.R.S.A. § 3050 (insurer must give twenty days notice to insured before cancellation is effective, or ten days notice if cancellation is for non-payment of premiums); and casualty insurance, 24-A M.R.S.A. § 2908(5)(A) (insurer must provide notice and the insured then has a ten day grace period after cancellation).

uncancelled and in full force." Clark v. Insurance Co. of North America, 89 Me. 26, 32, 35 A. 1008 (Me. 1896); see also Bragg v. Royal Insurance Co., 115 Me. 196, 198, 98 A. 632 (Me. 1916). This Court has previously ruled that failure to provide notice of cancellation to a mortgagee "effectively continued the policy in effect as to [the mortgagee]." Coastal Savings Bank v. Arkwright-Boston Manufacturers Mutual Insurance Co., 686 F.Supp. 17, 20 (D.Me. 1988). Additionally, a leading treatise on insurance law states that:

> Where the policy requires a notice to effect a cancellation, the insurer must comply therewith.... [W]here the required notice of cancellation is not given, the policy remains in force, notwithstanding a cause for cancellation, such as default in the payment of the premium.
>
> A reservation in a policy of insurance of a right to cancel upon notice to the insured makes notice a condition precedent to the exercise of the right by the insurer to cancel the policy.
>
> ...
>
> If the policy provides that certain things shall be stated in the notice of cancellation, omission thereof renders the notice ineffective.

17 G. J. Couch, Cyclopedia of Insurance Law §§ 67:130, 67:155 (2d ed. 1983) (footnotes omitted) (hereinafter Couch). The same arguments apply to a lapse provision where, as I have concluded, notice is a precondition to the lapse.[4]

E. Metropolitan argues that this result will have the effect of extending coverage on life insurance policies indefinitely. But insurers are free either to send out the required notice or to change the terms of their contracts (if permitted by state law).

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[4]I see no reason to distinguish life from casualty insurance for these purposes.

Sufficiency of the Notice

F. The Trustee argues that Metropolitan did not provide proper notice under the policy because: (1) the notice was ambiguous, and should be considered insufficient by construing it against Metropolitan; (2) Metropolitan sent the notice to Lewis rather than to Medomak, the owner of the policy; and (3) Metropolitan did not send the notice to the Trustee.

G. The notice was not ambiguous. It stated:

> The cash value of your flexible premium life policy is insufficient at this time to cover the payment that is now due. Unless the minimum due to avoid lapse shown above is received by 01/05/89, your valuable coverage under this policy will terminate.... So please, send your payment today to assure your continued insurance coverage....

In addition, the specific policy number was included on the notice.

H. Metropolitan sent the notice to Lewis at the box number used by both Lewis and Medomak. The salutation read "Dear Policyholder," and there was no reference to Lewis' corporate capacity. But notice to the president of a corporation amounts to notice to the corporation. The Maine Law Court has stated that:

> The plaintiff corporation must be charged with the acts of its president, and its agent's refusal to receive the Court's notice of the date of trial estops it from urging that it did not receive the same and had no knowledge of its contents.

Sheepscot Land Corporation v. Gregory, 383 A.2d 16, 23 (Me. 1978). See also 3 W. M. Fletcher, Cyclopedia of the Law of Private Corporations, § 811 (Perm. Ed. 1986); Couch, supra at §4 67.81 ("There is sufficient notice when delivery thereof is made to the insured's agent in charge of its office and place of business") (footnote omitted). Therefore, notice to Lewis was notice to Medomak.

I. It is undisputed that Metropolitan did not send the notice of impending lapse to-the Trustee. Metropolitan argues that the Trustee deserved no notice because he was not the owner of the policy under the terms of the policy and the Collateral Assignment. Under the ownership provision in the policy, see note 2 supra, ownership changes require written notice to the insurer, and are not binding until recorded at its designated office (here, New York). Metropolitan argues that because a written change of policy ownership notice was never recorded, the Trustee "was not entitled to any of the rights of ownership, including the right to surrender the Policy for its cash value and the right to receive a formal lapse notice.

But here, the owner of the policy never changed; instead the person authorized to exercise the rights of the owner changed as a matter of law. See In Re No. 1 Con-Struct Corp., 88 B.R. 452 (Bankr.S.D.Fla. 1988):

> Clearly, the insurance policy became Property of the Estate under [the bankruptcy laws]....Having all the rights and powers exercisable by the debtor, the Trustee...owned the policy and the beneficial interest thereunder.

Id. at 453. Mutual Trust Life Insurance Co. v. Wemyss, 309 F.Supp. 1221, 1226 (D.Me. 1970) (debtor's "interest in the policy vested in the Trustee as of the date of the filing of the petition in bankruptcy"). In Re O'Neill Enterprises Inc., 547 F.2d 812, 815 (4th Cir. 1977); Lincoln National Life Insurance Co. v. Scales, 62 F.2d 582, 585 (5th Cir. 1933). When the Trustee sent Metropolitan official notice of his appointment as interim Trustee for Medomak on October 5, 1987, Metropolitan should have begun treating him as the policy owner and directed all correspondence including the lapse notice (or at least a copy) to his attention.[5] Policy requirements such as the one governing change of ownership cannot stand in the way of this principle of bankruptcy law.

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[5] Metropolitan was obviously aware of the Trustee's status as early as December 1987 when its Portland office wrote the New York office and listed Bezanson as acting Trustee giving his South Portland address.

Because the Collateral Assignment gave Canal Bank certain rights of ownership, superseding even those of Medomak, Metropolitan may have been justified in refusing to pay the Trustee the cash surrender value. But that does not deprive the Trustee of his present ability to bring suit on the policy when it is clear that Canal Bank's interest has now been extinguished[6]. Although the terms of the Collateral Assignment may have prevented Metropolitan from paying the cash surrender value, they did not prohibit the mailing of a lapse notice to the policy owner. The assignment document specifically does not impose any obligation on the assignee to pay premiums. Thus, the Collateral Assignment did not strip from Medomak or the Trustee in Bankruptcy, the owner of the policy, the right to receive required notices of the need for premium payments.

J. Metropolitan argues that the Trustee had actual knowledge of the impending lapse as a result of correspondence sent to him in November of 1987, indicating that the policy had only twelve months of coverage remaining. The Trustee admits that he knew that at some point the policy would lapse if no action was taken on his part, but argues that the materials he received never mentioned a specific lapse date or grace period, and did not constitute the notice required by the policy.

The policy requires that the notice go out "at the start of the grace period." Such a notice never went to the Trustee, and earlier letters that may have alerted him that lapse in the future was likely are not sufficient; the policy owner is entitled to rely on the notice promised him by the policy.

Insurance as an Executory Contract

K. Metropolitan argues that this policy was an executory contract, never assumed by the Trustee and, therefore, not enforceable

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[6] The Trustee settled with Key Bank of Southern Maine, successor in interest to Canal Bank, relieving the Medomak estate of all claims by the Collateral Assignee. This was approved by the United States Bankruptcy Judge in March of 1988.

under 11 U.S.C. § 365(a),(d)(1), which provides:

> [T]he trustee, subject to the court's approval, may assume or reject any executory contract...of the debtor.... In a case under chapter 7 of this title [title 11], if the trustee does not assume or reject an executory contract...of the debtor within 60 days after the order for relief, then such contract...is deemed rejected.

The term "executory contract" is not defined in Title 11. The House Report states that "[t]hough there is no precise definition of what contracts are executory, it generally includes contracts on which performance remains due to some extent on both sides." H.R. Rep. No. 595, 95th Cong., 1st Sess. 347 (1977), reprinted in, 1978 U. S. Code Cong. & Admin. News 5787, 5844. This apparently is a shorter version of a definition originally drafted by Professor Countryman in Executory Contracts in Bankruptcy: Part I, 57 Minn.L.Rev. 439, 460 (1973), which defined an executory contract as one "under which the obligation of both the bankrupt and the other party to a contract are so far unperformed that failure of either to complete performance would constitute a material breach excusing the performance of the other."

Here, Medomak had paid monies into the accumulation fund to insure the life of Lewis in an amount sufficient to last well over two years from the date of the bankruptcy filing. To that extent, the contract was not executory at the time of bankruptcy filing and required no assumption or rejection by the Trustee.[7] Indeed, Met-

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[7]Metropolitan cites a number of cases in which insurance contracts were found to be executory for § 365 purposes. These cases and others all analyze the insurance agreement as a contract with continuing duties to perform on both sides. Premiums must be paid, often on a quarterly basis, and protection is provided for the covered period. When the premiums are unpaid at the time of bankruptcy, the insurer usually seeks to cancel, and the Bankruptcy Court requires a delay to allow the debtor to assume or reject the contract. There seems to be near unanimous agreement that these types of contracts are executory. See In Re New England Carpet Co., 18 B.R. 514, 516 (Bankr.D.Vt. 1982); In Re Gamma Fishing Co., 70

ropolitan refused to permit the Trustee to reject the contract by denying him the policy's cash surrender value.

Interest

L. The Trustee seeks interest on the policy proceeds from April 27, 1989 (presumably meaning May 27, 1989, the date of Lewis' death). I do not find persuasive the authority that suggests that because the insurer resists payment, the interest starts at date of death. See New York Life Insurance Co. v. Slocomb, 284 F. 810, 812 (9th Cir. 1922), cert. denied, 262 U.S. 745 (1923); Couch, supra at SS 52:12, 52:15 (footnotes omitted). Instead, the policy provision controls and interest runs from November 14, 1989.

M. Metropolitan has offered no alternative to the Trustee's proposal that because the policy does not specify an interest rate, the rate should be borrowed from Maine's prejudqment interest statute, 14 M.R.S.A. § 1602(1)(B), based on the United States Treasury Bill rate.

Accordingly, the Clerk shall enter judgment in the plaintiff's favor for $500,000, with interest as determined under 14 M.R.S.A. S 1602(1)(B) from November 14, 1989.

Dated at Portland, Maine this 1st day of March, 1991.

/S/ D. Brock Hornby
United States District Judge

B.R. 949, 951 (Bankr.S.D.Cal. 1987); Aetna Casualty & Surety Co. v. Gamel, 45 B.R. 345, 348 (N.D.N.Y. 1984); In Re B. Siegel Co., 51 B.R. 159, 161 (Bankr.E.D.Mi. 1985)("The policy of insurance imposed obligations of continuing performance on both the debtor and the insurance company - the obligation of Centennial to continue to provide insurance protection, and the obligation of the debtor to continue to promptly pay premiums. It is clearly an executory contract by reference to Professor Countryman's definition.) Unlike those cases, however, in the present case, the premiums were not unpaid at the time of bankruptcy, but instead were prepaid for over two years. It is for this reason that I find the contract was not then executory.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 9 1-1306 .

DENNIS G. BEZANSON, TRUSTEE FOR
MEDOMAK CANNING COMPANY, INC.,
Plaintiff, Appellee,

v.

METROPOLITAN INSURANCE AND ANNUITY COMPANY,
Defendant, Appellant.

No. 91-1357.

DENNIS G. BEZANSON, TRUSTEE FOR
MEDOMAK CANNING COMPANY, INC.
Plaintiff, Appellant,

v.

METROPOLITAN INSURANCE, ET. AL.,
Defendants, Appellees.

BEFORE
Selya, Circuit Judge and
Aldrich and Campbell, Senior Circuit Judges

ORDER OF COURT
Entered: January 7, 1992

Unsuccessful plaintiff has filed a petition for rehearing, the principal thesis of which is that the majority opinion, hereinafter the court, erred in "ignoring and trampling on accepted rules of appellate procedure" by adopting contentions advanced by defendant appellant that had not been made below. We need not reach the merits of this contention or why plaintiff did not proffer before what he would now add; it is moot in any event. The court rested its decision on two grounds; the first, as to which plaintiff's procedural complaint is now addressed; the second, and final one, as to which it does not apply. The court's ruling that defendant's failure to send a proper notice of lapse extended the policy indefinitely, thus ending the case.

For confirmation that this issue was in no ways new we have plaintiff's own words.

[T]he issues were reduced to three:...

3) failure to give the notice did not extend the policy for an indefinite time. The matters counsel states, in order to comply with our rule, to be of "exceptional importance," are not even relevant to the court's final decision.

The petition for rehearing by the panel is denied*

By the Court:

/S/ Francis P. Scigliano
Clerk.

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* Judge Selya, though continuing to believe that the court reached an erroneous result, see ante (Selya, J., dissenting), agrees with the procedural analysis contained in this order.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 91-1306.

DENNIS G. BEZANSON, TRUSTEE FOR
MEDOMAK CANNING COMPANY, INC.,
Plaintiff, Appellee,

v.

METROPOLITAN INSURANCE AND ANNUITY COMPANY,
Defendant, Appellant.

No. 91-1357.

DENNIS G. BEZANSON, TRUSTEE FOR
MEDOMAK CANNING COMPANY, INC.,
Plaintiff, Appellant,

v.

METROPOLITAN INSURANCE, ET. AL.,
Defendants, Appellees.

BEFORE
Breyer, Chief Judge,
Torruella, Selya, and Cyr, Circuit Judges

The panel of judges that rendered the decision in these cases having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges the the Court in regular active service and a majority of said judges not having voted that the appeal be heard or reheard by the Court en banc,

It is ordered that the suggestion for rehearing en banc be denied.

By the Court:

/S/ Francis P. Scigliano
Clerk.